

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petitions | : | |
| of | : | |
| HAMPTON INN / ALBANY-LATHAM / | : | |
| HOTEL ASSOCIATES | : | DETERMINATION |
| AND | : | DTA NOS. 816732 |
| HOTEL ASSOCIATES / HOLIDAY INN LATHAM | : | AND 816733 |
| | : | |
| for Redetermination of Deficiencies or for Refunds of | : | |
| Sales and Use Taxes under Articles 28 and 29 of the Tax | : | |
| Law for the Period June 1, 1992 through May 31, 1995. | : | |

Petitioner Hampton Inn / Albany-Latham / Hotel Associates, RD 1, Box 287, Cohoes, New York 12110, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1992 through May 31, 1995.

Petitioner Hotel Associates / Holiday Inn Latham, 946 New Loudon Road, Latham, New York 12110, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1992 through May 31, 1995.

On June 9, 1999 and June 10, 1999, respectively, petitioners, by Patrick K. Greene, Esq., and the Division of Taxation, by Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel), waived a hearing and agreed to submit this matter for a consolidated determination based on documents and briefs submitted by October 27, 1999, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether section 527.9(d) of the Division of Taxation's regulations (20 NYCRR 527.9[d]), which sets forth various requirements for certain exempt organizations to exercise their rights to exemption from the sales tax on hotel occupancy, violates petitioners' rights to equal protection of the law.

FINDINGS OF FACT

1. Petitioner Hampton Inn / Albany-Latham/ Hotel Associates is a partnership which owns and operates a Hampton Inn motel located at 981 New Loudon Road, Latham, New York.

Petitioner Hotel Associates / Holiday Inn Latham is a partnership which owns and operates a Holiday Inn motel located at 946 New Loudon Road, Latham, New York.

2. During the period at issue, petitioners rented rooms to employees and representatives of charitable organizations, which are exempt from the payment of sales tax pursuant to Tax Law 1116(a)(4) ("charitable organizations"), while such employees and representatives were on official business. Many of these employees and representatives provided petitioners with exempt organization certificates, paid for their rooms using personal credit cards or checks and were later reimbursed for this expense by their organization. Petitioners did not charge sales tax on these transactions.

3. Petitioners were subsequently audited by the Division of Taxation ("Division"). During the course of the audits, the Division determined that petitioners had improperly failed to collect sales tax on their rental of rooms to employees and representatives of charitable organizations on official business where the employees and representatives had paid for such rooms with their personal funds or personal credit cards and were later reimbursed by the organizations.

4. Petitioners paid the tax as determined on audit and subsequently filed applications for refund seeking refunds of tax paid on room rentals to employees and representatives of charitable organizations as described above. Petitioner Hampton Inn / Albany-Latham / Hotel Associates filed a refund claim for \$20,324.39 in sales tax paid for the period June 1, 1992 through May 31, 1995. Petitioner Hotel Associates / Holiday Inn Latham filed a refund claim for \$11,134.22 in sales tax paid for the same period.

5. By letters dated January 27, 1998 and March 5, 1998, the Division denied petitioners' claims in full. The letters stated the basis for the denial as follows:

Refund is being denied in full based on information submitted that was determined not acceptable according to the Tax Law. The issue relates to exempt sales that were denied based on rooms rented to an individual who was working for an exempt organization but paid for the room themselves [sic].

6. In their brief submitted herein, petitioners advised that they were no longer seeking refunds as set forth in their original refund applications. Petitioners conceded "an inability to locate supporting documentation for all denials." Petitioners stated that they now seek refunds of denials arising from transactions involving the exempt organizations detailed in documents submitted with their brief.

7. The Division did not dispute that petitioners were assessed and paid tax on the transactions involving the exempt organizations detailed in documents submitted with petitioners' brief.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioners argue that the Division has created two classifications of exempt organizations in its promulgation of regulations. Specifically, section 527.9(d) of the regulations (20 NYCRR 527.9[d]) requires charitable organizations exempt under Tax Law § 1116(a)(4) to

purchase hotel rooms directly in order to exercise their right to exemption from tax imposed under Tax Law § 1105(e), while governmental organizations exempt under Tax Law § 1116(a)(1), (2) and (3) and veterans' organizations exempt under Tax Law § 1116(a)(5) may exercise their rights to exemption either through direct purchases or through purchases by employees or representatives on official business. Petitioners assert that no rational basis exists for this unequal treatment, and that, as a result, this regulation violates the equal protection provisions of the New York State and Federal constitutions.

9. For its part, the Division asserts that its classification of exempt organizations under 20 NYCRR 527.9(d) is justified by the statutory language of Tax Law § 1116(a).

CONCLUSIONS OF LAW

A. Tax Law § 1105(e) imposes a tax, generally, upon “the rent for every occupancy of a room or rooms in a hotel.” Unless otherwise exempt, petitioners were required to collect such tax from their customers (Tax Law § 1131[1]; § 1132[a]).

B. Tax Law § 1116(a) exempts sales by or to the following governmental, charitable and veterans' organizations from tax imposed under section 1105(e), except as otherwise provided:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

(2) The United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

(3) The United Nations or any international organization of which the United States of America is a member where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

(4) Any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

(5) A post or organization of past or present members of the armed forces of the United States, or an auxiliary unit or society of, or a trust or foundation for, any such post or organization:

(A) organized in this state,

(B) at least seventy-five percent of the members of which are past or present members of the armed forces of the United States as defined in section thirteen-a of the general construction law and substantially all of the other members of which are individuals who are cadets or are spouses, widows, or widowers of past or present members of the armed forces of the United States or of cadets, and

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

C. Section 527.9(d) of the Division's regulations (20 NYCRR 527.9[d]) sets forth various requirements for certain exempt organizations to exercise their rights to exemption from the sales tax imposed on hotel occupancy. This regulation provides, in relevant part:

The following are exempt from the State and local sales tax imposed on hotel occupancy:

(1) New York State and its agencies and instrumentalities.

(i) Where payment is made by a representative or employee of the State or its political subdivisions while on official business, the exemption is established by furnishing the operator with a properly completed *Tax Exemption Certificate* (form AC-946).

(ii) Where direct payment is made by the State for occupancy by a representative or employee of the State or its political subdivisions while on official business, no certificate is required to establish the exemption.

(2) The United States of America and its agencies and instrumentalities.

(i) Where payment is made by a Federal employee while on official business, the exemption is established by furnishing the operator with a properly completed *Exemption Certificate, Tax on Occupancy of Hotel Rooms* (form ST-129).

(ii) Where direct payment is made by the United States for occupancy by an employee of the Federal government while on official business, no certificate is required to establish the exemption.

(3) The United Nations, any international organization of which the United States is a member, and ambassadors, ministers or other diplomatic representatives of foreign governments.

(i) Where payment is made by United Nations employees, or employees of any international organization of which the United States is a member, while on official business, the exemption is established by furnishing the operator with a properly completed *Exempt Organization Certification* or a properly completed Certificate of Sales Tax Exemption for Diplomatic Missions and Personnel, whichever is applicable.

(ii) Where payment is made by diplomatic or consular representatives and members of their families, the exemption is established by furnishing the operator with a properly completed Certificate of Sales Tax Exemption for Diplomatic Missions and Personnel.

(4) Organizations determined to be exempt under section 1116(a)(4) and (5) of the Tax Law.

(i) Where payment is made by an exempt organization for occupancy of rooms for its own use, or for use by its officers and employees in the conduct of the organization's activities, the exemption is established by furnishing the operator with a properly completed *Exempt Organization Certification* form.

(ii) Where the exempt organization purchases rooms for resale to its members, it is not liable for tax if a properly completed *Exempt Organization Certification* form is submitted to the operator, and the exempt organization is not required to collect tax on the charge for occupancy to its members because it is not the operator of a hotel.

(iii) (a) Where payment is made for hotel occupancy by use of personal funds or a personal credit card of duly authorized representatives acting on behalf of a post, organization or affiliate exempt under section 1116(a)(5) of the Tax Law to which an exempt organization certificate has been issued, the exemption is established by furnishing the operator with a properly completed "Exempt Organization Certification for Hotel or Motel Occupancy by Representatives of Veterans' Organizations" that has been executed by the post, organization or affiliate.

(b) Where payment is made directly to the operator by members of an exempt organization, other than duly authorized representatives acting on behalf of a post, organization or affiliate as described in section 529.8(j) of this Title, there is no exemption from the tax on occupancy.

D. Pursuant to this regulation, payment for hotel occupancy made by an employee or representative of a governmental organization exempt under Tax Law § 1116(a)(1), (2) or (3) or a veterans' organization exempt under Tax Law § 1116(a)(5), while on official business, may be exempt from tax where the employee or representative makes such payment by use of personal funds or personal credit card. In contrast, where a representative or employee of a charitable organization, while on official business, makes payment for hotel occupancy using his or her personal funds or personal credit card there is no exemption from tax (20 NYCRR 527.9[d][4][iii][b]). In this case, the Division's assessment of tax and denial of petitioners' refund claims was consistent with 20 NYCRR 527.9(d).

E. The Division of Tax Appeals has authority to determine whether the Division of Taxation's regulations are constitutionally valid (*see*, Tax Law § 2006[7]; *Matter of J. C. Penney Co.*, Tax Appeals Tribunal, April 27, 1989). As the party challenging the validity of the regulations, petitioners must show that such regulations are unconstitutional (*see, Trump v. Chu*, 65 NY2d 20, 25, 489 NYS2d 455, 459, *appeal dismissed* 474 US 915, 88 L Ed 2d 250; 20 NYCRR 3000.15[d][5]).

F. As applied to taxing statutes or regulations, equal protection requires that distinctions drawn between similarly situated taxpayers must be rationally related to a legitimate governmental purpose and must not be palpably arbitrary or amount to an invidious discrimination (*see, Town of Tonawanda v. Ayler*, 68 NY2d 836, 508 NYS2d 171; *Trump v. Chu, supra*; *Matter of Balan Printing*, Tax Appeals Tribunal, April 17, 1991).

G. Petitioners' equal protection claim must be rejected, for petitioners have not shown that they received uneven treatment from the State. The regulation to which petitioners object, 20 NYCRR 527.9(d), draws distinctions among exempt organizations. Petitioners, of course, are not exempt organizations; they are hotel operators as defined in Tax Law § 1101(c)(4) and 20 NYCRR 527.9(b)(2). The regulation draws no relevant distinctions among hotel operators and petitioners have not alleged, much less shown, that section 527.9(d) treats them differently from any other hotel operator in the state. Petitioners do allege--without proof-- that section 527.9(d) imposes an onerous administrative burden on them. While this allegation cannot be accepted without proof, even if true, such a burden would affect all hotel operators in New York. It would seem unlikely, therefore, that the imposition of such a burden would result in an equal protection violation. That the regulation in question imposes requirements upon charitable organizations to exercise their rights to exemption from the tax on hotel occupancy that are different from the requirements imposed on governmental and veterans' exempt organizations is clearly not a violation of *petitioners'* equal protection rights. Indeed, since petitioners and charitable organizations are not similarly situated, the treatment accorded charitable organizations is irrelevant to a determination of whether petitioners' equal protection rights have been violated.

Petitioners cited numerous cases in support of their position. None of the cited cases support the proposition that an equal protection violation exists where, as here, there has been no showing that the claimant has received uneven treatment from the government.

H. The petitions of Hampton Inn / Albany-Latham / Hotel Associates and Hotel Associates / Holiday Inn Latham are denied and the Division of Taxation's denials of petitioners' refund claims are sustained.

DATED: Troy, New York
January 20, 2000

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE